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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120604138-2289-01]

RIN 0648-BC21

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to re-open a portion of the Georges Bank Closed Area to the harvest of Atlantic surfclams and ocean quahogs. The area has been closed since 1990 due to the presence of toxins known to cause paralytic shellfish poisoning. The proposed re-opening is based on a request from the Mid-Atlantic Fishery Management Council and the recent adoption of a testing protocol into the National Shellfish Sanitation Program.

DATES: Written comments must be received no later than 5 p.m. eastern standard time, on [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by NOAA-NMFS-2012-0121, by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal <http://www.regulations.gov>.
- Fax: (978) 281-9177, Attn: Jason Berthiaume.

• Mail: Daniel S. Morris, Acting Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: “Comments on Proposed Opening of GB PSP Closed Area.”

Instructions: All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted via Microsoft Word, Microsoft Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jason Berthiaume, Fishery Management Specialist, phone (978) 281-9177, fax (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Georges Bank (GB) Closed Area, located in the Exclusive Economic Zone east of 69°00' W. long. and south of 42°20' N. lat., has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause paralytic shellfish poisoning (PSP). The closure was implemented based on advice from the U.S. Food and Drug Administration (FDA) after samples tested positive for toxins (saxitoxins) that cause PSP. These toxins are produced by the alga *Alexandrium fundyense*, which can form blooms commonly referred to as red tides, or harmful algal blooms, and can produce toxins that accumulate in water column filter-feeding shellfish. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death in humans.

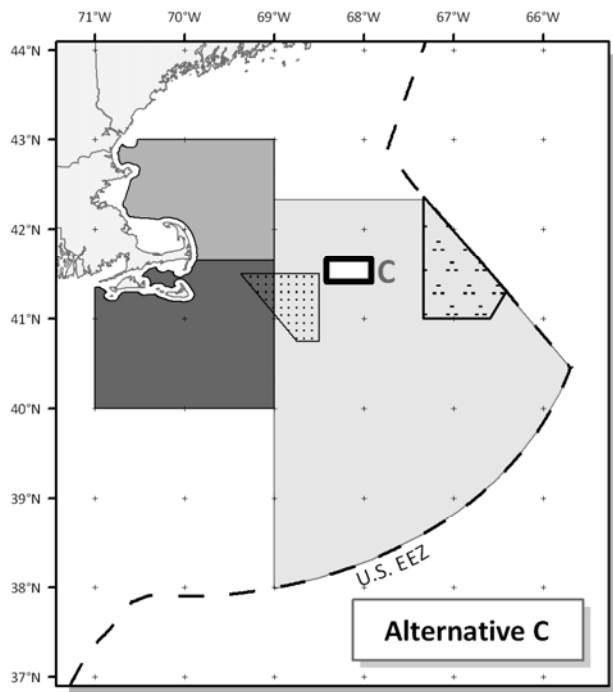
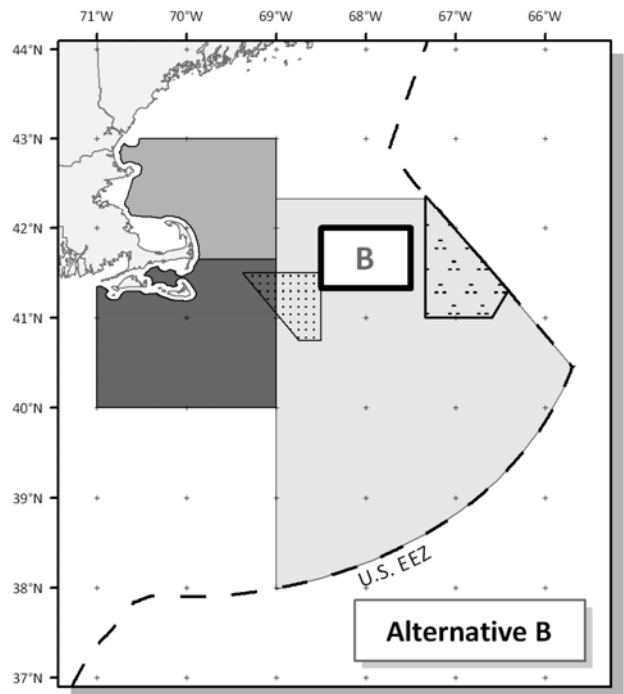
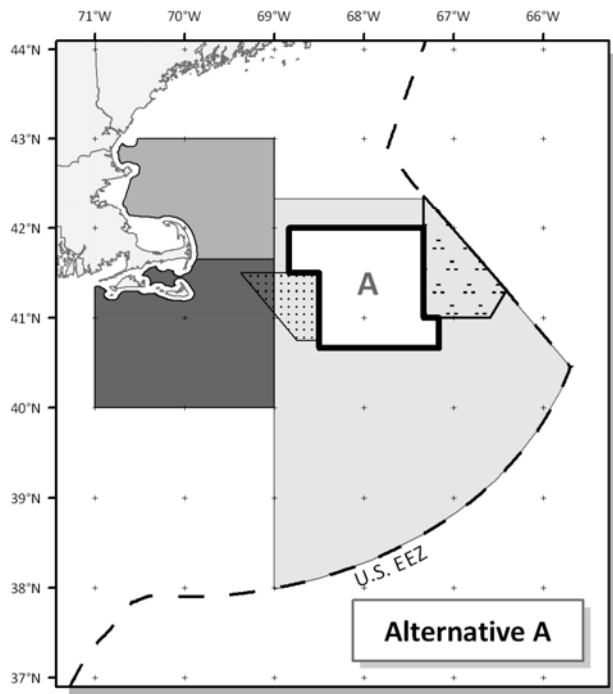
Due to inadequate testing or monitoring of this area for the presence of PSP-causing toxins, the closure was made permanent in 1999, under Amendment 12 to the Atlantic Surfclam and Ocean Quahog Fishery Management Plan (FMP). Since the implementation of the closure, NOAA's National Ocean Service has provided grants to the FDA, the states of Maine, New Hampshire, and Massachusetts, and a clam industry representative to collect water and shellfish samples from Federal waters off southern New England. NMFS has also issued exempted fishing permits (EFPs) since 2008 to surfclam and ocean quahog vessels to conduct research in the closure area. Testing of clams on GB by the FDA in cooperation with NMFS and the fishing industry under the EFPs demonstrate that PSP toxin levels have been well below the regulatory limit established for public health safety (FDA 2010). The FDA and NMFS also developed a Protocol for Onboard Screening and Dockside Testing in Molluscan Shellfish that is designed to test and verify that clams harvested from GB are safe. The protocol was formally adopted into the National Shellfish Sanitation Program at the October 2011 Interstate Shellfish Sanitation Conference.

On June 30, 2010, NMFS published a similar proposal in the Federal Register (75 FR 37745) to re-open a portion of the GB Closed Area. This proposed rule was later withdrawn due to public comments that opposed re-opening the GB Closed Area without having a testing protocol in place. Now that the protocol has been formally adopted, NMFS is proposing to re-open a portion of the GB Closed Area with the requirement that the protocol be used on all fishing trips into the area.

Three areas are being considered for re-opening. To allow the industry to access as much of the area as possible and to generate public comment on all options, NMFS is proposing to re-open the largest of the three areas (Alternative A). The Alternative A area reflects the largest

area that was previously permitted for sampling under an EFP, and the other alternatives areas are smaller subsets of the larger Alternative A area. The area proposed for re-opening is defined in the table below and the remaining portion of the GB Closed Area would remain closed.

Coordinate of the Area Proposed for Opening (Alternative A)		
Point	Latitude	Longitude
1	42°00'	68°50'
2	42°00'	67°20'
3	41°00'	67°20'
4	41°00'	67°10'
5	40°40'	67°10'
6	40°40'	68°30'
7	41°30'	68°30'
8	41°30'	68°50'



#### Open Area Alternatives

**A** Alternative A (6,381 sq mi)

**B** Alternative B (2,381 sq mi)

**C** Alternative C (447 sq mi)

#### Paralytic Shellfish Poisoning (PSP) Closed Areas

Georges Bank Closed Area (37,334 sq mi)

Northern Temporary PSP Closure Area

Southern Temporary PSP Closure Area

#### Groundfish Closed Areas

Closed Area I

Closed Area II

There have been no recent PSP toxin measurements recorded above regulatory limits, and PSP toxin monitoring would be conducted under the terms of the protocol for all trips into the area. Further, NMFS has the authority to close any area to harvesting of surfclams and ocean quahogs to prevent contaminated shellfish from entering the market. Any future closures or openings within the GB Closed Area will be based upon PSP toxin testing results conducted under the terms of the protocol, the advice of the FDA, and the most current information available.

NMFS proposes to re-open the portion of the GB Closed Area to the harvest of surfclams and ocean quahogs, under its authority at § 648.76(c). However, we will continue to defer to the FDA in matters of public health and, should we receive new advice from the FDA, we will reconsider which portion of the GB Closed Area should be opened for harvesting.

In addition, while NMFS proposes to re-open a portion of the GB Closed Area as requested by the Mid-Atlantic Fishery Management Council, NMFS also recognizes that red-tide events can vary inter-annually. For that reason, NMFS has prepared an environmental assessment (EA) that analyzes the proposed re-opening and two smaller area alternatives within the GB Closed Area, to cover the possibility that the proposed opening could shift or vary, depending on a change in conditions or if new information becomes available. Given the temporal nature of PSP conditions, NMFS is seeking public comment on whether this proposed re-opening should be implemented and, if so, which of the three areas should be re-opened (Alternatives A, B, or C).

#### Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, has determined that this proposed rule is consistent with the

Atlantic Surfclam and Ocean Quahog FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

NMFS prepared a draft EA for this action that analyzes the impacts of this proposed rule. A copy of the draft EA is available from the Federal e-Rulemaking portal <http://www.regulations.gov>. Type “NOAA-NMFS-2012-0121” in the Enter Keyword or ID field and click search. A copy of the EA is also available upon request from NMFS Northeast Acting Regional Administrator, Daniel S. Morris (see ADDRESSES).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is as follows.

The proposed measures would only affect vessels holding an active Federal open access surfclam and/or ocean quahog permit. In 2011, there were 47 Federal open-access surfclam and/or ocean quahog permitted vessels that landed surfclams and/or ocean quahogs. All of these vessels fall within the SBA’s definition of a small business. This action proposes to re-open an area that has previously been closed. The surfclam and ocean quahog fishery is managed under an Individual Transferable Quota system, and, since overall quotas are not being changed as a result of this action, no additional harvest would be permitted with this action. Participating vessels would still be able to fish in any of the existing areas open to the harvest of surfclams and ocean quahogs. Those vessels that may fish in the area proposed to be opened may experience increased operational costs, if they choose to fish there; however, these costs may be offset due



to increased productivity and efficiency of the fishing effort because of greater abundance of surfclams and ocean quahogs in the GB Closed Area. Regardless, any increased costs would not be considered significant.

In addition, for the past 5 years, NMFS has issued EFPs allowing the harvest of surfclams using the FDA-approved Protocol for Onboard Screening and Dockside Testing in Molluscan Shellfish. Because NMFS has issued EFPs to harvest surfclams within the GB Closure Area, and given that surfclams are more valuable than ocean quahogs, it is likely that vessels would continue this trend of targeting surfclams from the GB Closed Area. Due to the seasonal variability of PSP toxin levels, any or all of the areas associated with this action could open or close based on PSP conditions. Given this uncertainty as to whether the area would remain open, it is not anticipated that there would be an overall increase in participation in the surfclam and ocean quahog fishery due to the opening of this area. Therefore, because this action only proposes to re-open an area that has previously been closed, and because no net change in fishing effort, participation in the fishery, or fishery expenses is expected, this action will not have a significant economic effect on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

## List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: August 28, 2012.

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Alan D. Risenhoover, Director, Office of Sustainable Fisheries,  
performing the functions and duties of the Deputy Assistant Administrator for  
Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

### PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 648.76, paragraph (a)(4) is revised to read as follows:

#### § 648.76 Closed areas.

(a) \*\*\*

(4) Georges Bank. The paralytic shellfish poisoning (PSP) contaminated area, which is located on Georges Bank, and is located east of 69° W. long., and south of 42°20' N. lat. is closed to the harvest of surfclams and ocean quahogs. A portion of the Georges Bank Closed Area is open to harvest surfclams and ocean quahogs provided the vessel complies with the

requirements specified in paragraph (a)(4)(i) of this section. The open portion of the Georges Bank Closed Area is defined by straight lines connecting the following points in the order stated:

Open Portion of the Georges Bank Closed Area		
Point	N. Latitude	W. Longitude
1	42°00'	68°50'
2	42°00'	67°20'
3	41°00'	67°20'
4	41°00'	67°10'
5	40°40'	67°10'
6	40°40'	68°30'
7	41°30'	68°30'
8	41°30'	68°50'

(i) Requirements for Vessels Fishing in the Open Portion of the Georges Bank Closed Area. A vessel may fish in the open portion of the Georges Bank Closed Area as specified in this paragraph (a)(4), provided it complies with the following terms and conditions:

(A) A valid letter of authorization issued by the Regional Administrator must be onboard the vessel; and

(B) The vessel must adhere to the terms and conditions of the PSP testing protocol as adopted into the National Shellfish Sanitation Program by the Interstate Shellfish Sanitation Conference. All surfclams and ocean quahogs harvested from the area must be handled in accordance with the terms and conditions of the protocol from the first point of harvest through completion of testing and release by the State Shellfish Control Authority as required by the PSP testing protocol; and

(C) Prior to leaving port at the start of a fishing trip, the vessels' owner or operator must declare its intent to fish in the area through the vessel's vessel monitoring system.

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